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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 312.

JOSEPH ZANZONICO,

Petitioner,

vs.

MICHAEL ZANZONICO, Individually, and as Executor of Antonio Zanzonico, CARMELA ZANZONICO, and T. R. REALTY COMPANY,

Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

FRANK B. BOZZA,
Counsel for Petitioner,
374-6 Sanford Avenue,
Newark, N. J.

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Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement of Matter.

Your petitioner, Joseph Zanzonico, respectfully states that:

He filed a bill of complaint, January 18, 1945, in Chancery of New Jersey (designated since September 15, 1948, under the new State Constitution and Rules, as the Superior Court of New Jersey, Chancery Division), to foreclose 3 mortgages in the face amount of $3961.17, covering 2 tracts, consisting of 3 properties known as 175—14th Avenue, 297 South 7th Street and 295 South 7th Street, Newark, New Jersey (Stipulation of Facts; Plaintiff's Brief and Appendix, 36a).

On December 1, 1941, these 3 mortgages were in arrears in the payment of principal and interest in-

stallments. By virtue of the default clauses and by consent of the parties, your petitioner went into possession of the properties, as mortgagee, to collect the rents, which he did from December 1, 1941 to June 1, 1945 (Brief and Appendix, 58a, l. 30).

The total amount of rents collected was $6260.00. After deducting disbursements for carrying charges, maintenance and repairs, the petitioner claims a balance due him in the sum of $4142.26, with interest to be calculated from May 1, 1944, to the date of the decree (Exhibits C-14, C-15, C-16, Appendix, 75a).

During his possession as mortgagee, your petitioner made repairs, rented vacancies, paid taxes and other necessary carrying charges, and gave the property his personal attention as a provident owner (Appendix, 62a, ll. 10 to 18).

On June 1, 1944, the State Bureau of Tenement House Supervision first condemned the 3rd floor and later in its entirety property 297 South 7th Street, Newark, New Jersey, for lack of fire escapes. This condition was inherited and not created by petitioner. It existed under the owner-mortgagor for 27 years since he purchased the property and during the existence of the same State Bureau of Tenement House Supervision, during all that time. Accordingly, upon receipt of notice of condemnation, petitioner locked the front door of the property, from the inside and the rear french-doors with a yale lock; alerted the police that the premises were undergoing damage by boys and the theft of his tools and other property. Besides, he visited the premises as often as 3 times a day to supervise the premises; chased boys rampaging in the vacant house; and brought 2 boys to their parents for correction and discipline (Appendix, 70a to 71a).

The Court found that there is due petitioner only $1927.51 (Opinion, Appendix, 47a, l. 16), instead of the claimed amount of $4142.26, besides interest from May 1, 1944. In addition, the Court disallowed petitioner's proper disbursements in the sum of $1983.79 (Appendix, Opinion, 50a, l. 30; 51a, l. 22), and assessed waste against the petitioner in the sum of $2500.00 (Appendix, Opinion, 47a, l. 37). The net result of the Court's opinion is that petitioner must surrender his 3 mortgages for cancellation, as fully paid; and in addition the petitioner must pay the defendant, Carmela Zanzonico, a money judgment of $2091.45; and pay the defendant, Michael Zanzonico, a money judgment of $311.30, with interest (Appendix, Opinion, 48a, ll. 17 to 20).

The petitioner claims that by the erroneous decree of the trial court, affirmed by the Supreme Court of New Jersey, the highest court of the State, on June 6, 1949, that he has suffered a loss of $6545.00, in violation of constitutional rights to his person and to his property. This substantial loss of $6545.00 is made up of the $4142.26 claimed to be due him on the defaulted mortgages, with interest to be calculated from May 1, 1944, and the money judgments in the total sum of $2402.74 decreed to the two said defendants.

Apart from the non-existence of legal liability for waste which the Court charged against the mortgagee of the premises made vacant by the legal process of condemnation and vandalized by school boys, because the mortgagee was vigilant and affirmatively acted as a provident owner, there was no credible basis of fact to justify the assessment of waste against petitioner. It was based upon the testimony of the sole witness to the alleged waste who was discredited because of

his admitted bias against petitioner; his glaring personal interest; and his evasions and contradictions in the material aspects of his testimony (Appendix, 65a to 69a; Brief, p. 16, ll. 28 to 40; p. 17, p. 18, p. 19).

Your petitioner feels particularly aggrieved because he was denied his constitutional rights to his day in court by a full and fair trial; to a trial by jury to resolve the common law action of waste and the accounting facts, demanded in the pleadings by petitioner; to the right of due process in the protection of his property, in violation of his rights guaranteed by Article 6, Section 2, and Amendments 7 and 14 to the United States Constitution.

Statement of Jurisdiction.

Concurrently with the presentation of this petition for allowance of the writ of certiorari, in the sound judicial discretion of the Justices of the Supreme Court of the United States, the petitioner hereby presents the basis upon which it is contended that this Court has jurisdiction to review the judgment in question.

I. Federal Statute.

The petitioner relies upon the Judicial Code, Section 1257, subparagraph 3, Title 28 U. S. C. A., effective September 1, 1948, amending Section 237(b), Act of February 13, 1925, Chapter 229, 42 Statute 936, effective May 13, 1925:

> "An Act To Amend the Judicial Code, and to Further Define the Jurisdiction . . . of the Supreme Court, and For Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that sections . . . 237 . . . of the Judicial Code as now existing be, and they are severally, amended and reenacted to read as follows:

"Sec. 237(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, . . . any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution. . . ."

II. Constitution of the United States.

Article 6, Section 2, as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Amendment, Article 7, as follows: "In suits at common law, where the value in controversy shall exceed $20.00, the right of a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Amendment, Article 14, as follows: ". . .; Nor shall any State deprive any person of . . . property, without due process of law; . . ."

III. Date of Judgment and Application for Review.

June 6, 1949, was the date of the affirmance by the Supreme Court of New Jersey, the highest court of the State, of the decree of the Court below.

Application was made to the Chief Justice of the said highest court under Rules 36 and 38 of this Court and under Section 8 (d) of the Act of February 13, 1925, Chapter 229, 43 Statute 936, for a reasonable stay pending the filing and decision on the petition for writ of certiorari and it was denied on June 21, 1949.

Application for a writ of certiorari is being made to this Court by the instant petition.

IV. Legal Nature and Substance of the Case.

The substantial grounds for review claimed for the allowance of the writ on this petition, within the purview of *McArthur* v. *U. S.*, 315 U. S. ——, and *Zucht* v. *King*, 260 U. S. 174, 176-177, are of considerable gravity because petitioner has been deprived of his property, in violation of his constitutional rights of due process by denial of substantive and not mere procedural right of his day in court by a fair, full and impartial trial; by denial of his right to have a jury determine the factual issue of waste as well as the factual issues of the accounting, which was demanded by pleading of the petitioner in reply to the defendant's answer and counterclaim setting up waste and demand for accounting (Appendix, 24a, ll. 30 to 36; 25a, ll. 9 to 14; 27a, l. 29). The litigants stood in

an adversary position toward each other on the two common law issues of waste, debt and accounting.

The trial was one of fiat and personal viewpoint rather than by the orderly processes of law. Witnesses were dismissed with their proof and defendants and their counsel were invited not to return after the lunch hour, on the premise that the Court wished to determine *ex parte*, with the petitioner, if an accounting reference were necessary or whether the Court would undertake it *per se*. This uncertainty prevailed throughout the trial and resulted in proof being submitted in bulk tentatively, without sufficient cross examination of the pertinent accounting facts. Finally, the decision was reserved on the basis that the petitioner was not liable for waste since it was caused by vandalism of boys who broke into the vacant property. The Court further reserved on condition that if petitioner was liable for all waste that the case would be referred for the purpose of taking inescapable, copious proof (as if in law one could be guilty of waste by degrees or by percentage). Since the Court found waste against the petitioner in the sum of $2500.00, without referring it as hypothecated in the reserved decision, the constitutional rights of the petitioner against forfeitures and penalties and to enjoy due process by a full, fair and impartial trial, were seriously impaired. The petitioner sustained a financial loss of $6545.00 by the Court's decision in this case, which is a serious blow to his future at nearly 60 years of age rendering him penniless and destitute.

V. Stages in Proceedings and in What Manner Questions Sought to Be Reviewed Were Raised.

(A) Demand for Jury:

1. Complainant's replication and answer to counterclaim of defendant, Michael Zanzonico, filed May 31, 1945 (Appendix, 24a, ll. 30 to 36), as follows:

> "2. The complainant demands a jury trial upon the question as what moneys are due to the complainant and the various answering defendants and in what order said debts are entitled to be satisfied out of the properties set forth and more particularly described in the bill of complaint."

2. The above demand was repeated verbatim in complainant's replication and answer to counterclaim of the defendant, Carmela Zanzonico, filed May 31, 1945 (Appendix, 27a, ll. 29 to 35).

3. *Petitioner's brief and appendix* filed and orally argued in the Supreme Court of New Jersey, at page 16, line 6:

> "I doubt seriously if waste is a proper defense to an action in foreclosure. It raises a factual question of the nature and extent of the commission or omission of the act complained of and therefore is a question for a jury, which was demanded in the plaintiff's pleadings."

(B) Denial of Due Process to a Full, Fair and Impartial Trial:

(1) *Dismissing Witnesses, Litigants and Reserving Decision on Waste and Accounting*:

Cross examination of Tobias Cerrato, attorney for T. R. Realty Company, an intervening defendant, by Mr. Bozza, attorney for complainant, petitioner herein (Appendix, 70a):

> "Q. You represent the T. R. Realty Company in a legal capacity? A. Yes.
>
> Q. Do you personally have a financial interest in it? A. Yes.
>
> Q. Under what circumstances did you make out checks for repairs to that property? A. The workers did the work and I paid for the work done.
>
> Q. Was it your intention to increase its value and market it for sale? A. I hadn't thought of that.
>
> Q. I show you a check to Joseph Carlucci from you and ask you what that check is for, the work done? A. Work done at 297 South 7th Street. I have him here as a witness.
>
> Q. Look at the checks, there are approximately 35 checks. Will you tell what they are for? A. Each has the address there and refers to the job involved, and I expect to have witnesses here.
>
> * * * *
>
> The Court: If you gentlemen want to come back you can come back (referring to luncheon adjournment). I want those in evidence (referring to all papers that served as the basis for the report of complainant's accountant, Exs. C-14, C-15, C-16) and see if it is necessary to refer it

to a master. My present impression is that it isn't. It may be that some are not proper charges. I will have to look at the accounts.

(Hearing adjourned until 2:00 P. M.)

The Court: I have been thinking over during the lunch hour the matter of waste. It is my view that a mortgagee in possession or anyone else who is liable for waste is not responsible when vandals break in and do damage, but in this case I gather the doing of the injury continued over a period of a year and I think perhaps I ought to hear from the complainant as to what, if anything, he did to stop it. Now, if I come to the conclusion that he is liable for all waste I can see that there will be a good deal of evidence required on the subject and I will refer that part to a master. So you need not bother about all those checks and the witness that said $8,000.00 or $9,000.00. I would like to know or hear what Joseph knows of the facts" (Appendix, 72a, 73a).

On this point complainant's counsel says in his brief at page 24:

"Prior to that the 35 checks made out by the attorney for the T. R. Realty Company, Tobias Cerrato, were to be explained by the witnesses that were in Court and to be called in substantiation of them and accordingly cross-examined thereon, particularly on the phase of the extent and reasonableness of the charges of repairs and whether the repairs transcended the part alleged to be waste. This reserved decision on reference to a master regarding the extent and amount of waste was followed by a judgment of waste

against the complainant for $2500.00, after the Court decided the whole matter on curtailed and abbreviated testimony . . . the amount involved is substantial, and not as the Court says insufficient to pay a master. The constitutional rights of due process relating to appellant's property is seriously involved. Whether the Court undertakes the accounting or whether it is referred, complete proffer of proof must be allowed with ample right of cross-examination of all items in dispute. . . ."

Complainant's brief at page 21:

". . . all sides contemplated an accounting by reference. The record reveals this by the comments of counsel, during the trial and by the expressed views of the Court from time to time:

'Mr. Herbert: I am afraid to get into the account.

The Court: I am inclined to think we could settle the account. I don't mean to go into every item. You have to show me it is unusual' (R. 54)."

Referring to the cross examination of complainant by Mr. Connelly, for two defendants, Mr. Herbert appearing for the other defendant, says (Brief, 21, Appendix, 36a):

"Mr. Herbert: May I say it is in evidence that there were some vacancies. Aren't we getting into the account?"

Referring to items of accounting:

"Mr. Bozza: If your Honor will have the account I will prove it. I thought it would be referred.

The Court: You will have to prove items that are not usual in a real estate account. Do you understand what I mean?

Mr. Bozza: I do understand. I feel it is a proposition of law" (R. 47; Appendix, 64a, ll. 30 to 40).

(2) *Submitting Proof In Bulk Without Sufficient Cross Examination*:

Cross examination of complainant by Mr. Connelly:

"Q. I show you a batch of receipts signed by Joseph Zanzonico and ask you . . . is that your signature? A. Yes.

The Court: Show him the whole batch.

(Batch of papers admitted in evidence and marked D-1; R. 36; 63a, l. 16.)"

"The Court: . . . I want the complainant to get his books and records and his checks and to bring them here at 2 o'clock."

(Referring to basis for report of complainant's accounts, Ex. C-14, C-15, C-16 in evidence, R. 28; Appendix, 74a to 78a.)

* * * *

"The Court: Did Joseph get his books?

Mr. Bozza: Yes.

The Court: Mark them in evidence.

(Envelope containing records admitted in evidence and marked C-22, R. 85.)"

Admitting photographs, under objection, improperly, prejudicially, and in bulk, on direct examination

of the witness, Arthur Donofrio, called on behalf of the defense (Appendix, 66a):

"*Direct examination by Mr. Connelly*:

Q. I show you some pictures and ask you what you know about the pictures. A. I was there when they were taken. My friend took the pictures and I supervised them.

Q. What do they represent? A. They represent the damage to the property after I left.

* * * *

Q. Tell us what the condition of the property was and what they represent? A. This one photograph represents the broken glass from the broken windows, on the south side of the building.

Mr. Bozza: I object on the ground that he is not the person who took them. His testimony is improper.

The Court: I will permit it.

Mr. Connelly: I offer them all together.

Mr. Bozza: I object unless you produce the gentleman who took them.

The Court: I overrule the objection. I will receive them.

(Ten photographs admitted in evidence and marked D-3, 66a.)"

(3) *Evasions, Contradiction and Bias of the Witness*:

"*Cross examination of witness by Mr. Bozza* (69a):

Q. Who took the pictures? A. My brother.

* * * *

Re-direct examination by Mr. Connelly (69a):

Q. I notice the name on the photograph? A. Yes, my brother had his name changed."

On this point complainant's brief says at page 18:

"He lied when he said on direct examination that his friend took the pictures of the waste in evidence. He admitted on cross examination that it was his brother. This concealment or falsity, was attempted because the name of the brother of the witness, appearing on the photograph, was different than his own because he had it changed legally. . . . In the usual course of human events, it is gratifying to be able to say that your brother is your friend; but, in a case where considerable evasion is employed regarding personal interest, the contradiction or exposure is significant in testing the veracity of the witness. It leaves one shorn of any confidence in his credence.

Q. Are you in any way interested in the proceeds? A. Myself personally, no.

The Court: Any member of your family?

The Witness: No.

The Court: What did you mean when you said yourself personally no?

* * * *

Q. Are you friendly with anyone who is interested in this case financially? A. Not particularly.

Q. In what way are you? A. Well——

The Court: That is what we are trying to find out.

The Witness: I am not friendly.

Q. Joseph's attorney sued you in the District Court for payment of the last two months rent? A. He started suit in the District Court and because of the increase I took him into the OPA.

Q. You are friends with Joseph Zanzonico? A. I wouldn't say that.

Q. When did you go to Alaska? A. I believe in 1943."

On the foregoing point, complainant's brief says at pages 18, 19:

"This witness was the panacea to recovery for damages of alleged waste. The witness was the tenant who knew all about the condemnation; the time and extent of the total damages; the one who ordered and supervised the taking of photographs; who made the complaint to the OPA; and finally the realtor and expert on valuations. It is even doubtful if he got back from Alaska in time to be aware of all he says. . . ."

At page 16:

"Apart from the application of the law cited, the decree errs in awarding waste in the sum of $2500.00 on the discreditable testimony of Arthur Donofrio, the star witness to the alleged waste. There was grave suspicion of the witness' personal interest. His testimony was evasive, contradictory and lacked the qualification and basis for his estimate of the amount of waste allegedly committed. His denial of financial interest and personal interest in the case does not inspire credibility."

(4) *The Question of Due Process*:

As to the constitutional rights seriously affected by the curtailed trial, submission of evidence in bulk without sufficient opportunity for intelligent examination of the accounting facts; and the dismissal of witness with their proof in denial of the right to cross examine them, once assured they were in court and would testify, the complainant says in his brief at pages 22, 23:

> "This confusion and uncertainty, whether the full proof should be marshalled before the Court doubtful of settling the accounts itself or later before a master, caused the evidence to be introduced, informally . . . and at times in bulk, without sufficient opportunity for full and intelligent examination of the accounting facts . . .; That the trial was had just before the new judicial system and new rules took effect and that the tendency was speed in order not to have an undecided case on hand. . . . Even the important element of time in dispensing justice cannot supersede the substantive rights of litigants AND THE OVERALL RIGHT OF DUE PROCESS."

At page 24:

> "The appellant was entitled to cross examine the mechanics on the time and extent of the repairs, and the reasonableness of the charges reflected by the 35 checks which was not afforded. The amount involved is substantial and not as the Court says, insufficient to pay a master. The constitutional rights of due process relating to appellant's property is seriously involved."

VI. Supporting Brief.

The State has decided a federal question of substance in a way not in accord with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings, on the dual questions of denial of trial by jury of the common law issue of waste and accounting and the constitutional right of due process to a full, fair and impartial trial, as to call for the exercise of this Court's power of supervision.

1. Trial by Jury:

Article 7 of the Amendments to the United States Constitution says:

> "In suits at common law when the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to rule of common law."

Like the feudal system, there is nothing so common-law in our jurisprudence, as the doctrine of waste. The axe of waste in feudal days was more drastic than construed in American jurisprudence. Take, for instance, the English doctrine of a tenant being liable to the reversioner for waste by whomsoever committed, even by a stranger, the only exceptions being those caused by an act of God, the public enemy and the reversioner. Chancellor Kent says, in 4 Kent Commentaries, 76, 77, 82:

> "The American Doctrine . . . of waste is some-

> what varied from the English Law. . . . Perhaps the universal silence in our Courts upon the subject of any such responsibility of the tenant . . . is presumptive evidence that the doctrine of permissive waste has never been introduced and carried to that extent in the Common Law Jurisprudence of the United States."

The definition of waste is the destruction or material alteration of corporeal hereditaments to the injury of the inheritance by any person rightfully in possession, who does not have the fee, title or full estate. It must be done or permitted by unreasonable and improper abuse. 27 R. C. L. 1011. Thus it hypothecates an act or neglect with intentio mala; an unreasonable or improper abuse, done or permitted. It differs from tort in which intent need not be present.

The premises became vacant through the legal intervention of the State Board of Tenement House Supervision and its subsequent damage by vandalism of boys does not constitute waste to be assessed against the petitioner, as a mortgagee in possession. Query: should a mortgagee in possession install fire escapes to a building in 1944, when its owner-mortgagor failed or refused to do so during the prior 27 years of his ownership? In the case of *U. S.* v. *Bostwick*, 94 U. S. 53, 24 L. Ed. 65, the Court said at page 68:

> ". . . the implied obligation is not to repair generally but to so use the property as to make repairs unnecessary as far as possible. It is in effect a covenant against voluntary waste and nothing more."

In the United States Supreme Court case of *United Zinc & Chemical Co.* v. *Britt et ux.,* 258 U. S. 268, 42 S. Ct. 299, 66 L. Ed. 615, 36 A. L. R. 28, Mr. Justice Holmes, said:

> "Infants have no greater rights to go upon other peoples' property than adults and the mere fact that they are infants imposes no duty upon the landowners to expect them. . . ."

This same social philosophy endorsed by law was markedly pointed out, in *Ryan* v. *Towers,* 1901, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481, wherein Hooker, *J.*, speaking for the majority said:

> ". . . There is no more lawless class than children, and none more annoyingly resent an attempt to prevent their tresspasses. . . . The consequence is that they roam at will over private premises . . . and to attempt to remove a crowd of boys from private premises . . . would be a roaring farce, with all the honors in favor of the juvenile."

Since waste can exist also by way of beneficial alteration, addition or improvement, wouldn't the petitioner have made himself liable if he had installed fire escapes? In *Brock* v. *Dale,* 66 Wis. 142:

> "Any material change in the nature and character of the building made by a tenant is waste, although the value of the property should be enhanced by the alteration."

Therefore, does the law permit the paradox that one must commit a waste to be relieved of another waste?

The charge of waste in this case grew out of an answer and counterclaim to a bill of foreclosure. It was legislated in 28 U. S. C. A., Section 384:

> "Suits in equity shall not be sustained . . . in any case where a plain, adequate and complete remedy may be had at law."

There is no waiver of the right to jury trial of legal issues because they are mingled with equitable ones. The right to trial by jury according to the rules of common law as directed in the Enabling Act, 28 U. S. C. A., Sections 723(b), 723(c), is of course preserved. *William Goldman Theatres* v. *Kirkpatrick*, 154 F. 2d 66 (C. C. A. 3rd, 1946). *Smith* v. *American National Bank*, 89 F. 832 at page 838 (C. C. A. 4th, 1898), says:

> "Taking this section, 28 U. S. C. A., sec. 384, in connection with 28 U. S. C. A. secs. 770, 773, . . . it is perfectly clear that this congress, by this legislation, intended to preserve all litigants a right deemed both valuable and sacred."

Though the federal rules have abolished the procedural distinction between law and equity, remedies remain the same. *Fitzpatrick* v. *Sun Life Assurance Co. of Canada*, 1 F. R. D. 713 (D. N. J., 1941); *Ettleson* v. *Metropolitan Life Insurance Co.*, 137 F. 2d 62 (C. C. A. 3rd, 1943), question certified to the United States Supreme Court, 317 U. S. 188, 63 S. Ct. 163, 87 L. Ed. 156, 1942, holds:

> ". . . although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either in law or equity have been merged into one action, the rules have not enlarged or diminished the right to either a jury or court trial.

> Basic issues formerly triable by a jury as of right are still triable by a jury as a matter of right."

Other federal jurisdictions holding merger of equitable and legal issues leave the right to trial by jury intact in common law cases are *U. S. Fidelity & Guaranty* v. *Janick,* 3 F. R. D. 16 (S. D. Cal., 1943); *Prudential Insurance Co.* v. *Saxe,* 134 F. 2d 16 (App. D. C., 1943), cert. den. 319 U. S. 745, 63 S. Ct. 1033, 87 L. Ed. 1701; *Young* v. *Loew's Inc.,* 2 F. R. D. 350 (S. D. N. Y., 1942); *Bruckman* v. *Hollzer,* 152 F. 2d 730 (C. C. A. 9, 1946); *Sherwood* v. *U. S.,* 112 F. 2d 587 (C. C. A. 2, 1940).

This is not merely a rule of procedure but is based upon the inhibition contained in the Seventh Amendment to the United States Constitution, *Slocum* v. *N. Y. Life Insurance Co.,* 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Am. Cas. 1914 D, 1029; especially, where the parties stand in an adversary position toward each other, *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227.

Since pleadings have been simplified under modern rules of practice, the pleadings themselves should be used as a foundation for the question to be put to a jury, *U. S.* v. *Aluminum Co. of America,* 44 F. Supp. 97, 310 (S. D. N. Y., 1941). In the case *sub judice* a trial by jury was demanded in petitioner's reply to defendants' answer and counterclaim setting up the claim and defense of waste and accounting.

2. Denial of Due Process to a Full, Fair and Impartial Trial.

While objection was made to the testimony of the witness to the waste, as revealed in this petition and in the record, formal exceptions to rulings and orders of the Court are no longer necessary, *Monaghan* v. *Hill,* 140 F. 2d 31 (C. C. A. 9, 1944). It shall be sufficient that a party at the time the ruling or order was made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and his grounds therefor. In *Meany* v. *U. S.*, 112 F. 2d 539, 130 A. L. R. 973 (C. C. A. 2, 1940), it was held that persistent offers of evidence negative waiver of objection to its exclusion, since the taking of formal exceptions is no longer necessary.

State procedural rules must be reasonable and a failure of due process results if they prevent or deny a fair trial, *Hammond Packing Co.* v. *Ark.*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530; *Havey* v. *Elliot,* 17 S. Ct. 841, 167 U. S. 409, 42 L. Ed. 215.

Due process requires that those whose rights are being determined be given an opportunity to be heard before the liability is finally fixed. These must be required by the law, and not merely accorded as a matter of grace. The hearing required must be full and fair on all matters on which liability depends as to which the decision is to be final, else that would bind one by decision made without an opportunity to be heard, *McGregor* v. *Hogan,* 44 S. Ct. 50, 263 U. S. 234, 68 L. Ed. 282; *Turner* v. *Wade,* 41 S. Ct. 27, 254 U. S. 64, 65 L. Ed. 134.

Due process requires the determination of the existence of the facts on which a liability depends to be made by a court before the liability is irrevocably fixed, *DeKich* v. *Blair,* 3 F. 2d 302; *Lipke* v. *Lederer,* 42 S. Ct. 549, 259 U. S. 557, 66 L. Ed. 1061; *Oceanic Steam Navigation Co.* v. *Stranchan,* 29 S. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013.

Due process requires that rights be not burdened with risks as to effect a practical denial thereof, *Okla. Operating Co.* v. *Love,* 40 S. Ct. 338, 252 U. S. 331, 64 L. Ed. 596.

It is urged that the Court seriously erred, within the rulings of the foregoing cited cases, in not granting a trial by jury on the common law issues of waste and accounting facts, as demanded in petitioner's reply pleading; in admitting over objection photographs of the alleged waste and testimony of the value and amount of waste by the witness without having established sufficient qualifications to do so and particularly in view of his evasions, contradictions and personal interest, accompanied with his admitted bias for your petitioner; in dismissing the witnesses and their proof, putting them beyond the rightful opportunity of cross examination, once they were in court for that purpose; in curtailing the trial, allowing proof in bulk without sufficient, intelligent examination of the accounting facts; and, finally, reserving decision on the premise of ascertaining if the Court would refer the elements of accounting and waste and then making a final dispositive decision thereon adverse to your petitioner, all in denial of Article VI, Section 2, and Articles VII and XIV of the Amendments to the United States Constitution.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of New Jersey, that this case may be reviewed and determined by this Court as law and justice may require.

And your petitioner will ever pray.

Respectfully submitted,

FRANK B. BOZZA,
Counsel for Petitioner.